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THE CHANGES IN THE MATRIMONIAL PROPERTY REGIME IN CROATIA – THE UNFINISHED QUEST FOR IMPROVEMENT

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Abstract
Croatian family legislation went through several reforms in the last twenty years and this paper focuses on the matrimonial property regime after the most recent legislative intervention in 2015. The Family Act 2015 tried to attach more importance to the matrimonial property relations, thus providing for some significant changes and novelties. While there were certainly legitimate aims behind the changes introduced, for example increasing the level of legal certainty in the real estate trading or the protection of the child's wellbeing in the cases of breaking the family union with respect to its right to habitation, it is doubtful whether those aims are achieved. The relevant provisions of the Family Act 2015 raise some serious concerns and generate certain new problematic points but at the same time leave previously opened issues unresolved. The author analyses the regulation of the matrimonial property regime with the purpose of detecting its advantages and its shortcomings as well as indicating the possibilities for improving the existing situation.

Keywords: *Spouses, Matrimonial property, Administration of property, Liability of spouses, The family home*

1. Introduction

During the last two decades Croatian family legislation went through several reforms and the focus of this research is the matrimonial property regime after the most recent legislative intervention in 2015[1]. The specific nature of relations within the family also requires special regulation of certain aspects of property relations established between the family members. The marital union implies exercising of different property interests of spouses and in the case of divorce there will be property issues to resolve which in practice often leads to long-lasting court proceedings. The property relations were long considered as a less important part of the family law[2]. The situation has been changing but not in a comprehensive and thought through manner.

[1] Majority of the legislative changes this paper refers to was actually introduced by the Family Act 2014 (Obiteljski zakon, Narodne novine, br. 75/2014). However, that Act was suspended by the Constitutional Court only a few months later, in January 2015, due to a significant number of requests for review of the constitutionality was submitted with respect to a large number of its provisions. The new Family Act 2015 came into force in September 2015 but it is almost identical to the Family Act 2014. Considering that the Family Act 2014 was in force for such a short period and that the changes it introduced have only taken root with the Family Act 2015, which is in force for almost four years now, it seems appropriate to analyse the subject of this paper as the said novelties were introduced by the Family Act 2015.

[2] Alinčić, M.; Hrabar, D.; Jakovac-Lozić, D.; Korać Graovac, A., *Obiteljsko pravo*, Narodne novine, Zagreb, 2007, p. 498.

Overall, in the area of matrimonial property relations the Croatian legislator did not succumb to the hyperregulation trend, but it tried to attach more importance to this part of the family law. The Family Act 2015[3] includes only fourteen articles (arts. 34 - 46) on the matrimonial property relations which, at the same time, provide for some significant changes and novelties with a view to increase the level of legal certainty in the real estate trading; provide more protection for the third parties entering legal transactions with one of the spouses and for the other spouse who did not take part in the transaction; protect the child's wellbeing in the cases of breaking the family union with respect to its right to habitation in the family home.

There were certainly enough of the legitimate aims in the basis of the changes introduced however it is doubtful whether those aims are achieved. The modified regulation of the matrimonial property relations seems to generate some serious concerns while at the same time leaving previously existing issues unresolved. Hence, the relevant provisions of the Family Act 2015 governing the property relations of spouses will be analysed in this paper with the purpose of detecting its advantages as well as its flaws and the possibilities for improving the existing situation.

2. Legal regime of the property relations of spouses

The property relations of spouses are governed by the relevant provisions of the Family Act 2015 unless the spouses agree otherwise (art. 34). According to art. 38, matters of property relations of spouses that are not regulated specifically by the Family Act 2015 shall be settled on the basis of the relevant rules of the law of realty and the law of obligations. Therefore, the Family Act is *sedes materiae* of the material and procedural family law as well as the *lex specialis* for governing the matrimonial property relations. It is important to keep in mind these provisions, especially art. 38, as the latest interventions in the text of the Family Act brought some unnecessary repetitions of the relevant provisions from other applicable laws together with creating certain confusing divergences from those laws and leaving some important gaps unfulfilled.

2.1. Matrimonial property and separate property

Pursuant to art. 35 of the Family Act 2015, spouses may have matrimonial property and separate property. Matrimonial property includes all the property that the spouses acquired through their labour during the marital union or which originates from that property (art. 36 § 1). As wee see here, essential elements of acquiring the matrimonial property, which also determine its structure, are labour, the duration of the marital union, and the object of the matrimonial property[4].

It is important to distinguish the duration of marriage and the duration of marital union because the latter is the time reference for determining the structure of the matrimonial property. The marital union is a legal standard, a factual situation that implies the existence of all the usual contents of conjugal life. Therefore, the marital union ceases to exist if the spouses terminate all mutual relations that are otherwise a part of conjugal life because they no longer want to live as a married couple. The duration of the marital union does not have to coincide with the duration of marriage.[5] Not only the divorce proceedings may be ongoing after the termination of the marital union, but the proceedings regarding the property relations of (ex) spouses may last long after the divorce is finalised (and they usually do).

The only details regarding the structure of the matrimonial property are the provisions providing explicitly for the profits from games of chance and the benefits from copyright and related rights gained

[3] Obiteljski zakon (Family Act 2015), Narodne novine, br. 103/2015.

[4] From the standpoint of the Croatian family law it is not important what kind of labour it is, but only whether that labour is realised during the marital union. See more in: Belaj, V., *Bračna stečevina po Obiteljskom zakonu*, Pravo i porezi, no. 11, 2002, pp. 34-35.

[5] A common place of residence of spouses is not the criteria for determining the duration/termination of the marital union. For example, the spouses could live apart for many years because one of them is working abroad. Alinčić, M.; Hrabar, D.; Jakovac-Lozić, D.; Korać Graovac, A., *op. cit.* note 2, pp. 502-503.

during the marital union as parts of matrimonial property (art. 36 § 2). This determination is supplemented by the courts' jurisprudence which includes in the matrimonial property e.g. all the revenues accrued on the basis of the labour contract, property and rights acquired as the compensation for the damaged or destroyed property or right which was a part of matrimonial property, fruits of the (movable and immovable) property which represents matrimonial property[6].

The property owned by the spouse at the time of entering into the marriage as well as the property that he/she acquired during the marital union (but not on the grounds of labour, games of chance or copyright) remains his/her separate property (art. 39). For example, it is the property spouse acquires by inheritance or gifts. The copyright is expressly prescribed as separate property of the spouse who created it (art. 39). Jurisprudence determined that the spouse's separate property are also e.g. financial assets received as a compensation for damages suffered due to loss event[7] and the property acquired under special privileges[8] (like the rights of defenders or the victims of the Homeland War).

Within this context there are certain long-standing open issues regarding the status and the governing of the stocks and business shares in companies, rights regarding bank savings and life insurance, right of usufruct, managing the claims spouses have against debtors, etc. For example, stocks and business shares in companies can also be the subject-matter of the division of matrimonial property, however they are not classical ownership rights (and the spouses cannot be regarded as co-owners) but rather specific contractual relations entered into by investing money and property[9]. The situation is even more complicated when only one of the spouses is registered as holder of stocks and shares and the jurisprudence does not provide a solution[10], therefore it is regretful that the legislator remained silent on the issue.

The issue of property acquired on the basis of the life-maintenance contract[11] and life-care contract[12] in cases only one of the spouses is named as a provider of support was also not addressed. The jurisprudence is very divergent and inconsistent; sometimes the courts consider acquired property as the matrimonial property, and sometimes as separate property of one of the spouses. The problem is these contracts are of aleatory nature, and in practice they are often concluded between the relatives. Also, it is not uncommon for the parties to conclude one of the mentioned contracts to cover a gift or a testamentary disposal.[13]

Also, it would have been desirable for the legislator to address the status of gifts with more details. In practice, gifts are often agreed upon orally which makes it difficult to prove whom they belong to once the dissolution of the spouses' co-ownership on the matrimonial property is discussed in

[6] Aralica, T., *Bračna stečevina i drugi imovinski odnosi bračnih drugova u sudskoj praksi*, Novi informator, Zagreb, 2016, p. 20.

[7] Vrhovni sud Republike Hrvatske, Rev-929/2007-2, 2.4.2008.

[8] Vrhovni sud Republike Hrvatske, Rev-1365/2008-2, 10.2.2010.

[9] Jelinić, Z., *Bračna stečevina u kontekstu Zakona o trgovačkim društvima*, in: Rešetar, B.; Župan, M. (eds), Imovinskopravni aspekti razvoda braka - hrvatski, europski i međunarodni kontekst, Pravni fakultet u Osijeku, Osijek, 2011, pp. 123, 135.

[10] Županijski sud u Zagrebu, Gž-4740/07, 29.7.2009; Vrhovni sud Republike Hrvatske, Rev-1069/05, 8.6.2005; Vrhovni sud Republike Hrvatske, Rev-1176/10-2, 11.12.2012.

[11] Under a life-maintenance contract, one party (provider of maintenance) undertakes to support the other party or a third party (recipient of maintenance) until his death and the other party undertakes to convey to the former all or a portion of his property, with the acquisition of things and rights being postponed until after the death of the recipient of support. Zakon o obveznim odnosima (Contractual Relations Act), Narodne novine, br. 35/2005, 41/2008, 125/2011, 78/2015, 29/2018, art. 579.

[12] Under a life-care contract, one party (provider of care) undertakes to support the other party or a third party (recipient of care) until his death and the other party undertakes to make an *inter vivos* transfer of all or part of his property to the provider of support. *Ibid*., art. 586.

[13] Aralica, *op. cit.* note 6, pp. 25-26.

court.[14] The situation is exacerbated by the inconsistent jurisprudence[15] ,so it is obvious the legislator's action is necessary.

The basic legal assumption within the matrimonial property regime is important for the attribution of property and states that spouses are co-owners of their matrimonial property in equal shares, unless otherwise agreed (art. 36 § 3). Namely, spouses are left with the broad autonomy to arrange their property relations differently by concluding a matrimonial property agreement (see *infra*).

Among the novelties within the legal regime of the matrimonial property there are the provisions of art. 36 § 4 and art. 36 § 5 which represent the legislator's attempt to mitigate a significant practical problem. To be more precise, it is quite often that only one of the spouses is registered as owner of a real estate which gives him/her the opportunity for disposing with that property independently of the other spouse/co-owner. Such dispositions cause many disputes that remain unresolved both by the jurisprudence and the legislation[16]. Therefore, art. 36 § 4 provides for certain simplification of the registration of real estate which is the matrimonial property. Registration of the ownership of such real estate may be carried out also[17] on the basis of the proposal of the both spouses containing explicit, written and unconditional statement with which one spouse consents to the registration of the other spouse's ownership in equal shares or otherwise if so agreed. The provision of art. 36 § 5 adds a requirement[18] that, on the document containing the described statement, the signature of the spouse who consents to the registration of the other spouse's ownership must be authenticated by a notary public.

The regulation of administration of matrimonial property in the Family Act 2015 also suffered some significant modifications. "Suffered" because, at least in our opinion, this intervention will not contribute to clarification and simplification of situation in this area.

Distinction has to be made between matters of ordinary and matters of extraordinary administration. Regarding the matters of ordinary administration, for the purposes of clarification art. 37 § 1 enumerates few examples of such operations – regular maintenance, exploitation, and use of the property for its usual purpose. It is possible for one of the spouses to undertake an operation of ordinary administration alone because the consent of the other spouse is presumed until proven otherwise.

Pursuant to art. 37 § 2, operations of extraordinary administration of real estate as well as of the movable property which has to be registered in public registries would be e.g. changing the purpose of the property, major repair, additional construction work, adaptation, sale of the entire object, rent or lease of the entire object for a period exceeding one year, mortgage on the entire object, lien of the movable property, establishment of servitudes, real burdens or the right to build on the entire object. Extraordinary administration requires joint undertaking of an operation by both of the spouses or a written consent of the other spouse with the signature authenticated by the notary public.

The list of operations considered to be matters of extraordinary administration only burdens the legislative text as it is literally copied from the Ownership and Other Real Rights Act[19]. The subsidiary application of the latter Act is already prescribed by the art. 38 of the Family Act 2015 so the wording of art. 37 § 2 gives an impression that the Family Act, being the *lex specialis*, regulates something differently than the Ownership and Other Real Rights Act.

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[14] Kačer, H., *Dugovi i darovi pri diobi bračne stečevine*, in: Rešetar, B.; Župan, M. (eds), Imovinskopravni aspekti razvoda braka - hrvatski, europski i međunarodni kontekst, Pravni fakultet u Osijeku, Osijek, 2011, p. 111.

[15] Aralica, *op. cit.* note 6, pp. 25.

[16] It is a very complex issue in the Croatian legal system which is not possible to analyse in detail in this paper. For the explanation of this novelty see: Vlada Republike Hrvatske, Konačni prijedlog Obiteljskog zakona, https://www.sabor.hr/en/admin/structure/sabor_data_entity/86539, p. 191 (7.6.2019.).

[17] "Also" suggest this is an additional possibility of registering ownership in the land registry, other than what is provided for by the Land Registration Act.

[18] This also suggests a requirement additional to those prescribed by the Land Registration Act.

[19] Zakon o vlasništvu i drugim stvarnim pravima, Narodne novine, br. 91/1996, 68/1998, 137/1999, 22/2000, 73/2000, 114/2001, 79/2006, 141/2006, 146/2008, 38/2009, 153/2009, 90/2010, 143/2012, 152/2014, art. 41.

Even bigger problem derives from the fact that the application of art. 37 § 2 is limited to movable property which has to be registered in public registries. The wording of this provision provoked a lot of criticism because it leaves out movable property that can be of a very high value (e.g. works of art, jewellery) but its registration is not mandatory. This suggests that the joint undertaking or written consent with the authenticated signature is not required for operations of extraordinary administration regarding movable property which does not have to be registered. This assumption diverges from the relevant provision of the Ownership and Other Real Rights Act which requires consent of all the co-owners for undertaking operations exceeding the scope of ordinary administration[20] on the co-owned object as a whole, whether movable or immovable, and regardless of whether the movable property has to be registered. Also, this solution could leave a spouse without the legal protection in case the other spouse disposes of such movable property that is not registered.

The Ministry of social policy and youth (the Ministry), as a leading manager of the process of drafting the Family Act 2015, argued that art. 38 of the Family Act 2015 is to be applied to transactions of registered movable property, while those movables that belong to the matrimonial property but are not subjected to registration are governed by the general system established by the Ownership and Other Real Rights Act[21]. Technically speaking, this may be right but, in our opinion, it does not even remotely correspond to the purpose of art. 37 as described by the Ministry[22] – achieving transparency and coherence of the family-law regulation of the property relations of spouses and providing the spouses with a sort of 'one-stop-shop' for getting information about the operations that involve additional requirements.

Furthermore, according to art. 37 § 3, the absence of consent for matters of ordinary as well as extraordinary administration does not affect the rights and responsibilities of the third party acting in good faith. The spouse who did not consent to an operation constituting extraordinary administration has the right to compensation for damage suffered. The wording of art. 37 § 3 departs from one of the general rules of law which says that no one can transfer more rights to another individual than he/she himself/herself has[23]; it is contrary also to the rule about a contract which is contrary to the mandatory regulations as being null and void[24]; it is contrary to the relevant provision of the Ownership and Other Real Rights Act[25] which provides for the application of the rules on management without mandate[26] in case a co-owner enters a transaction regarding a co-owned property without the required consent of the other co-owners.

This solution means less protection for a spouse who got played by the other spouse disposing with their matrimonial property as it was his own. As already mentioned, it is unfortunately too often the case that only one of the spouses is registered as owner in a land registry, so the provision of art. 37 § 3 widens the possibilities of misuse and fraudulent actions by the registered owner/spouse. In view of the disorder in the land registry system, the legislator's intention was to give more strength to the principle of trust in land registers[27] and to provide more protection for the third parties acting in good faith. However, besides all the other mentioned flaws, the legislator seems to have ignored the latest practice of the Constitutional Court. The latter suggests that both the principle of trust in land registers and the principle of the spouses' co-ownership on the matrimonial property (regardless of whether they are both registered as co-owners) are of equal importance in the Croatian legal system and adds to the

[20] *Ibid*.
[21] Ustavni sud Republike Hrvatske, U-I-3101/2014 i dr., 12.1.2015, § 111.
[22] *Ibid*.; Vlada Republike Hrvatske, *op. cit.* note 16, pp. 191-192.
[23] *Nemo plus iuris ad alium transfere potest quam ipse haberet*.
[24] Zakon o obveznim odnosima, *op. cit.* note 11, art. 322 § 1.
[25] Zakon o vlasništvu i drugim stvarnim pravima, *op. cit.* note 19, art. 39 § 2.
[26] The institute of management without mandate is regulated by the arts. 1121-1129 of the Contractual Relations Act. Zakon o obveznim odnosima, *op. cit.* note 11.
[27] Zakon o zemljišnim knjigama (Land Registration Act), Narodne novine, br. 91/1996, 68/1998, 137/1999, 114/2001, 100/2004, 107/2007, 152/2008, 126/2010, 55/2013, 60/2013, 108/2017, art. 8.

relevant legislation certain criteria and rules for settling disputes in this area. Therefore, one could raise a question of the constitutionality of art. 37 § 2 and § 3.[28] The debates and analysis of the relationship between those principles have been ongoing in the Croatian legal practice and the theory for a long time now[29] and will surely continue, so it remains to be seen what will the application of art. 37 of the Family Act 2015 add to this discussion.

3. Contractual arrangement of the matrimonial property relations

The spouses[30] who prefer to govern their property relations regarding the existing and the future property differently than the legal regime does may conclude a matrimonial property agreement (art. 40 § 1). In the Croatian family law the matrimonial property agreement is a formal contract and its validity is conditional on the written form with the spouses' signatures authenticated by the notary public (art. 40 § 3). The Family Act 2015 does not go much further in regulating these contracts, thus leaving the spouses with the freedom to dispose on their property autonomously and allowing any agreement that is not contradictory to the compulsory regulations. Spouses should, however, make note of the art. 40 § 2 prescribing that any stipulation on the management or the disposition of property has legal effect on the third parties only if it is entered into land register, or into public records where registration is required for acquiring of the rights or the property may not be used without such registration.

Pursuant to art. 41, if the spouse is legally incapacitated for making of extraordinary legal acts, his/her guardian may conclude the matrimonial property agreement in the name of that spouse upon obtaining a prior consent of a social welfare centre. In such a case, the matrimonial property agreement must be drawn up in the form of a notary public act[31]. With this requirement the legislator seeks to provide the legally incapacitated persons with additional protection[32]. Namely, the notary public must check whether the social welfare centre approved the conclusion of that contract[33].

The possible content of the matrimonial property agreement is also not regulated with any details. Spouses may change the status of certain assets from matrimonial property to separate property and *vice versa*, e.g. they could stipulate that anything any of them inherits shall be a part of their matrimonial property or that their wages (that is, property gained from work) shall be considered as their own separate property.

The only specific limitation regarding the conclusion of matrimonial property agreements is prescribed by the art. 42 in the form of prohibiting the spouses to stipulate the application of foreign law to their property relations.

There have been suggestions for establishing a registry of matrimonial property agreements which would facilitate legal transactions and strengthen the legal certainty. Such a register would also provide more legal security for the spouses both from the aspect of their mutual property relations as

[28] See more in: Aralica, *op. cit*. note 6, pp. 34-36.

[29] E.g.: Josipović, T.; Ernst, H., *Uloga zemljišnih knjiga u pravnom prometu bračnom stečevinom*, in: Kačer, H. (ed), Liber amicorum in honorem Jadranko Crnić, Novi informator, Zagreb, 2009, pp. 547-592.

[30] The art. 249 § 1 of the Family Act 2003 explicitly stated that the bride and groom and the spouses respectively may conclude such an agreement which meant that such a contract could be agreed upon before or during the marriage. See: Obiteljski zakon, Narodne novine, br. 116/2003, 17/2004, 136/2004, 107/2007, 57/2011, 61/2011, 25/2013. The Family Act 2015 mentions only spouses. This modification was not explained but there is nothing to suggest it was the legislator's intention to depart from the previous approach. Matrimonial property agreement concluded before the marriage will have a suspensive effect.

[31] Notary public act is a document on the legal actions and statements of the parties drawn up by a notary public, in a special form, with a special content and following procedural rules. This kind of documents have the status of a public document. Zakon o javnom bilježništvu (the Notaries Public Act), Narodne novine, br. 78/1993, 29/1994, 162/1998, 16/2007, 75/2009, 120/2016, art. 3.

[32] The Notaries Public Act itself requires, in art. 53 § 1, the form of a notary public act as a condition for the validity of the contracts on disposing of the property of the legally incapacitated persons. *Ibid*.

[33] Alinčić, M.; Hrabar, D.; Jakovac-Lozić, D.; Korać Graovac, A., *op. cit.* note 2, p. 518.

well as their property relations with the third parties.[34] Unfortunately, the legislator did not use the latest reform for establishing the registry of matrimonial property agreements together with the obligation of spouses to register such contracts.

4. The spouses' liability to the third parties

This part of the regulation of the matrimonial property relations also underwent some changes. In line with art. 43 of the Family Act 2015, obligations and liabilities of the spouse that he/she assumed prior to entering marriage, as well as those assumed in his/her own capacity after entering marriage but not in connection with the ordinary needs of the marital and the family union, are not binding for the other spouse.

Both spouses are liable as solidary debtors for the obligations assumed by one of the spouses for the purpose of settling needs of the marital and the family union, and for the obligations they assumed jointly in connection with the matrimonial property. The property with which they are liable is also specified - spouses are liable for their solidary obligations with both their separate and the matrimonial property (art. 44 § 1). It is presumed that the debt is divided equally among them but they may agree otherwise (art. 44 § 3). If one of the spouses covers more than his/her share of debt, he/she has the right to reimbursement from the other spouse (art. 44 § 2). While the provision of art. 44 § 1 indeed represents a (new) specificity of the matrimonial property regime, the other two provisions of art. 44 bring, again, unnecessary burden to the legal text as they only repeat what is already prescribed by the relevant rules of the law of obligations[35] which are to be applied on all of the matters of matrimonial property that are not regulated differently by the Family Act.

5. Regulating the property relations of spouses after the termination of marriage or of the marital union

5.1. Modalities of governing the property relations of spouses

Provisions governing the property relations of spouses after the termination of their marriage or of their marital union are also a novelty in the Croatian family law system, but they are also the source of certain objections.

If the spouses have not reached an agreement on their property relations after the marriage or the marital union ended, their property relations may be settled by a court's decision (art. 45 § 1). In case the spouses have not reached the said agreement, their property relations shall be settled on the basis of the provisions of the Family Act 2015, while the questions concerning their property relations that are not regulated by this Act shall be settled on the basis of the relevant provisions of the law of realty, law of obligations, and other relevant legislation (art. 45 § 2).

In our opinion, it should be understood that lacking the spouses' agreement the court may settle their property relations so one could wonder why the legislator considered it necessary to point this out. In our opinion, this redundancy only supports the criticisms directed towards the provisions of art. 45 due to the fact they imply the spouses have the possibility of determining their property relations (by an agreement or a court decision) only after their marriage or their marital union ends, and not while they still last.

[34] For more details see: Čulo, A.; Šimović, I., *Registar bračnih ugovora kao doprinos sigurnosti u pravnom prometu,* Zbornik Pravnog fakulteta u Zagrebu, 59, (5), 2009, pp. 1029-1068; Majstorović, I., *Bračni ugovor. Novina hrvatskoga obiteljskog prava*, Sveučilište u Zagrebu, Pravni fakultet, Zagreb, 2005, pp. 213-215.

[35] Zakon o obveznim odnosima, *op. cit.* bilj. 11, arts. 52 and 53.

5.2. Specific provisions on protection of the welfare of children and of the family home

One of the most significant novelties brought about by the Family Act 2015 is the right to family home or, to be more precise, the right to habitation in the family home which is a part of the matrimonial property.

Among the personal rights and responsibilities of spouses the Family Act 2015 introduces, in art. 32, "the family home and the protection of the right to habitation". It is provided that the spouses shall agree on their place of living, that is, the family house or the flat where they will live with the children under their parental responsibility and which will be their family home (art. 32 § 1).

During the marriage one spouse may not, without a written consent of the other spouse whose respective signature is authenticated by a notary public, dispose of the family home representing matrimonial property in which the other spouse lives with their children (art. 32 § 2). Similarly, if only one of the spouses is a lessee of the apartment in which the spouses live together with the children over whom they exercise parental responsibility, he/she may not terminate the contract on lease without a written consent of the other spouse whose respective signature is authenticated by a notary public, unless it is an official apartment under the special regulations (art. 32 § 3).

Pursuant to art. 32 § 4, if one of the spouses refuses to give his/her consent (for disposing of the family home or for the termination of the lease) to the other spouse without a good reason, a court may, upon an application of a spouse, substitute the missing consent with its own decision. The court must take into consideration the housing needs of both of the spouses and the children living with them as well as all the other relevant circumstances.

While it is possible to discern what the family home is[36], it is not completely clear what is the right to habitation in the family home or who is the holder of the right. There is no definition of the right and its nature is undetermined. The confusion and uncertainty arise from the fact there already exists the right called "right to habitation" and is regulated by the Ownership and Other Real Rights Act as one of the personal servitudes[37]. If it was the legislator intention to introduce this right as one of the new personal rights of spouses, than it should have made an effort to distinguish it clearly from the right to habitation as one of the real rights. Furthermore, it would have been desirable if the holders of the right were explicitly stated. Even though art. 32 is placed, as already mentioned, among personal rights of spouses, the wording of its provisions put a lot of emphasis on the protection of the child, and we shall see that later in the text that the Family Act 2015 mentions the spouse's exercising of the right to habitation in the family home and explicitly speaks of the right of the child to habitation in the family home.

As a significant shortcoming of this new institute in the Croatian family law it has been pointed out that its regulation is not comprehensive. Namely, its scope is limited to the family home representing the matrimonial property, thus it does not apply to the family home which is separate property of one of the spouses. The critics noticed that this solution differs from the Council of Europe Recommendation on the rights of spouses relating to the occupation of the family home and the use of the household contents[38]. On the one hand, the Ministry's argument that the reason for limiting the protection of the family home to the house/flat representing matrimonial property is the need for citizens to gradually

[36] Evidently, the family home must be determined by the spouses' agreement, the family home must be a residential property, and the spouses have to be its co-owners. Šimović, I., *Obiteljski dom, novi Obiteljski zakon iz 2015. i Preporuka Vijeća Europe o pravu bračnih drugova na korištenje obiteljskog doma*, in: Barbić, J. (ed), Pravo na dom – Okrugli stol održan 28. siječnja 2016. u palači Akademije u Zagrebu, Hrvatska akademija znanosti i umjetnosti – Znanstveno vijeće za državnu upravu, pravosuđe i vladavinu prava, Zagreb, 2016, pp. 146-147.

[37] Zakon o vlasništvu i drugim stvarnim pravima, *op. cit.* note. 19, arts. 199 and 217.

[38] Recommendation No. R (81) 15 of the Committee of Ministers to Member States on the rights of spouses relating to the occupation of the family home and the use of the household contents, https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804d01b8 (2.6.2019.).

adapt to this new legal institute is acceptable. However, the Ministry fell into clear contradiction with itself when it argued that the aforementioned Recommendation is not a binding instrument because this very Recommendation was expressly stated as a basis for establishing of the institute of family home[39] in the Croatian legal system.

Furthermore, a spouse is not prohibited from disposing with the rights and obligations from the lease in other ways than terminating the contract on lease, e.g. subletting the apartment. The question also remains whether it would be possible to make an application to the court with a view to circumvent the lack of consent of the other spouse in case the other spouse is prevented to give the consent due to some objective circumstances (e.g. he/she is missing or is severely ill).

Besides this, specific provisions on the protection of the welfare of children and of the family home are contained in art. 46 and form a part of the regulation of the property relations of spouses after the termination of the marriage or of the marital union.

So, in case the marriage or the marital union has ended, upon application of a spouse, the court may decide that the right to habitation in the family home representing matrimonial property shall be exercised only by the spouse who is residing with their common minor children over whom he/she exercises parental responsibility (art. 46 § 2). The right to habitation may last until the dissolution of the co-ownership of the house/apartment that is their family home (art. 46 § 3).

When considering the application, the court may, taking account of the relevant circumstances, commit the spouse (the resident parent) to paying a lump sum for the rent to the other spouse (the non-resident parent), and also decide on his/her liability for paying utilities for the family home (art. 46 § 4).

When deciding about the right to habitation and the obligation to pay the rent, the court shall take account of the principle of proportionality, protect the child's right to habitation in the family home and at the same time act fairly towards the spouse who bears the burden of the exercise of the right to habitation (art. 46 § 5). The court may, depending on the circumstances of the case, reject an application for the habitation in the family home if the total revenue of spouses does not cover the costs of separate habitation of the parents and their children (art. 46 § 6).

It is clear from the provisions of both the art. 32 and art. 46 that the *ratio* behind the institution of the right to habitation in the family home is the protection of the welfare of the child. However, it is only in art. 46 § 5 that the child is expressly mentioned as the holder of the right to habitation in the family home representing the matrimonial property of its parents. The parent is not explicitly stated as the holder of the right even though art. 46 speaks about the spouse's exercising the right to habitation in family home.

Considering all the mentioned provisions of the art. 46 one could also wonder is it really just the one of the spouses who bears the burden[40] of the exercise of the right to habitation (and if it is, than which one), or they actually both share that burden. They are the co-owners of the family home; the fact one of them has to move out represents a limitation of his/her ownership rights; the other spouse bears the costs of remaining in the family home with their common minor children and possibly also the cost of the rent for the other spouse who moved out. Unless one or both of the spouses have significant separate property, or at least a large salary, they are both very much burdened with these circumstances.

6. Concluding observations

Unfortunately, this research revealed that the legal framework provided by the Family Act 2015 for governing of the matrimonial property relations seriously lacks of concreteness, certainty and clarity. Predictability, legal certainty and transparency, higher level of protection for spouses and the third parties entering legal transactions with (one or both) spouses concerning the matrimonial property,

[39] Ustavni sud Republike Hrvatske, *op. cit.* note. 21, § 130-131; Vlada Republike Hrvatske, *op. cit.* note. 16, pp. 193-194.

[40] This solution also raises serious doubts as to whether it is realistic to commit the spouse to bear all the said costs considering the overall economic situation in Croatia.

protection of the child and its right to habitation in the family home were presented as justifications for modifications of the previous regulation.

Despite the fact there were serious issues waiting to be resolved well before the process of writing the Family Act 2015 begun, the legislator mostly ignored them. For the most part the legislator intervened by copying provisions of other legal texts to which the Family Act 2015 itself already expressly refers to as the rules applicable to the matrimonial property relations. It is an unnecessary distortion of the rule about the Family Act being the lex specialis for the matrimonial property relations which determines only the specifics diverging from the general regime established by the law of realty and the law of obligations. The result is that it is not clear enough which rules and regime are to be applied and when. It is highly questionable whether an interested citizen, a layman in law, could manage this situation by himself. The situation is further exacerbated with certain interventions that indeed bring new solutions but in the way, that creates legal uncertainty.

The scope of the legislative changes in the regulation of the matrimonial property regime is obviously limited and its flaws are likely to produce new practical problems in addition to those already existing. It would seem appropriate to start by carefully "purging" this part of the Family Act, to delete all the redundant provisions and then add more details where they are actually necessary. Resolving (long-standing open) issues regarding certain rights and assets as a part of matrimonial or separate property of spouses as well as clarifying and improving the provisions on administering the matrimonial property is also necessary. Furthermore, establishing of the registry of the matrimonial property agreements would be very useful. Further revising of the regulation of the right to habitation in the family home is needed. Last, but certainly not the least, at the bottom of the most significant issues in this area is the disorder in the land registry and cadastre. It is an issue of the Croatian legal system so big and complex that there was no point in even starting to analyse it in this paper due to the limited space. We will limit ourselves to the observation that there is simply no provision of the Family Act, which alone could remedy the massive problems arising from the said disorder, effects of which far exceed the area of matrimonial property relations. Fixing the state of the land registries and the cadastre is therefore a necessary precondition for the proper governing of property relations in general and of the matrimonial property relations in particular.

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